CHUNG CHEE CHOY & ORS v. CHEE MUN MINING

HIGH COURT MALAYA, IPOH
MOSES SUSAYAN JC
[CRIMINAL APPEAL NO: AA-41(ORS)-1-09-2022]
1 AUGUST 2023

Abstract – *(i) A revision application is not a second appeal on questions of law. The High Court sitting in revision should only use its revisionary jurisdiction if a serious injustice has occurred; (ii) Section 99(1) of the Criminal Procedure Code ('CPC') establishes a two-stage process for Magistrates to follow when dealing with complaints about immovable property that could lead to a breach of the peace. Firstly, the Magistrate must be convinced that the complaint is about immovable property and that it is likely to lead to a breach of the peace. If so, the Magistrate will issue a preliminary order. Secondly, the Magistrate will hold an inquiry under s. 99(4) of the CPC to determine which party, if any, is in actual possession of the disputed land. The Magistrate will not consider the merits of the parties' claims to the land, but will only look at the evidence of possession.*

CIVIL PROCEDURE: *Courts – Jurisdiction – High Court – Revisionary powers – Complaint to Magistrates' Court on dispute involving immovable property likely to cause breach of public peace – Magistrate committed grave procedural error in application of s. 99(4) of Criminal Procedure Code – Magistrate entered arena in which she had no jurisdiction to decide – Whether warranted High Court's interference in decision of Magistrates' Court – Whether matter could proceed to High Court as appeal – Whether High Court could proceed to hear matter with revisionary power vested – Criminal Procedure Code, s. 323 – Courts of Judicature Act 1964, s. 35*

CRIMINAL PROCEDURE: *Revision – Revision of proceedings – High Court's revision on Magistrates' Court's decision – Complaint to Magistrates' Court on dispute involving immovable property likely to cause breach of public peace – Criminal Procedure Code, s. 99 – Whether Magistrate complied with two-stage process under s. 99(1) – Whether Magistrate committed grave procedural error in application of s. 99(4) – Whether Magistrate entered arena in which she had no jurisdiction to decide*

This was an appeal from a decision rendered by the Magistrates' Court following an inquiry pursuant to s. 99 of the Criminal Procedure Code ('CPC'), based on a complaint filed by the appellants regarding a dispute involving an immovable property that was likely to cause a breach of public peace ('complaint'). The appellants claimed that they were in actual possession of a piece of land as the appellants and their ancestors were said to have been cultivating the land, which was once an abandoned ex-mining

land, into agriculture land and an animal farm for local supply. The appellants had been living peacefully on the land since 2016 and some of the appellants had even applied to the authorities to have the land alienated to them. In mid-2016, the respondents and/or their representatives began harassing the appellants, claiming that they owned the land. The respondent claimed to be in possession of the land by presenting evidence of owning a mining permit for land demarcated as Land A and Land B for which they had a temporary occupation licence from the State Authorities and further, they had business operating on the land. Due to the conflict on the land, there were numerous police reports lodged between the appellants and the respondent. Finally, the respondent's representatives forcibly took possession of the land. The respondent's actions prevented the appellants from entering the land, disrupted livestock and farming operations, confiscated crops and deprived the appellants of income. The appellants were concerned that the conflict with the respondent would escalate into a public confrontation and a breach of peace over the land. The complaint filed at the Magistrates' Court was for a temporary order to prevent a breach of peace from the parties' dispute over the land. The Magistrate decided that the respondent had actual possession of the land and thereby dismissed the appellants' complaint. Hence, the present appeal. At the start of the appeal, the respondent raised three preliminary objections: (i) that the matter could not be proceeded as an appeal as there were no statutory provisions for an appeal ('first preliminary objection'); (ii) that the Magistrate failed to comply with s. 99(1) of the CPC in that she failed to provide grounds on which she was satisfied that a dispute was likely to cause a breach of peace over the land; and (iii) the failure to name the State Government as a party.

Held (setting aside order of Magistrates' Court):

(1) The first preliminary objection was a valid objection. The proceeding herein could not be by way of an appeal. The court, however, proceeded to hear the matter with the revisionary powers vested in the High Court. In light of the Magistrate's grave procedural error in the application of s. 99(4) of the CPC, in that, she entered an arena in which she had no jurisdiction to decide on the rights of the parties *vis-a-vis* legal ownership or otherwise of the disputed land, it warranted this court to interfere in the decision of the Magistrates' Court by exercise of its revisionary powers. (paras 14, 39 & 40)

(2) Section 99(1) of the CPC mandates a two-stage process. First, the Magistrate must be convinced that the complaint is about immovable property and would cause a breach of the peace. After the first step, the Magistrate will issue a preliminary order under s. 99(1) of the CPC. The second stage which consists of calling the parties for an inquiry under s. 99(4) to determine, without reference to the merits of the claim of any of the parties to a right to possess the land but to peruse the statements

so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as the Magistrate thinks necessary and if possible, decide whether any of the parties are in actual possession. Followed by this determination, the Magistrate will issue a final order under s. 99(6), declaring the party entitled to retain possession of it until evicted by law and forbidding all disturbance of such possession until such eviction. (para 5)

(3) Although the preliminary order in this case was not a speaking order as it ought to be, the Magistrate at this juncture of making the preliminary order had heard and carefully considered the complaint and as such, had applied her mind to the material before her. The Magistrate issued the preliminary order because she was satisfied that there was a dispute relating to the immoveable property and that the dispute was likely to cause a breach of peace. The preliminary order did not give the complainant a remedy in any way. The only thing it established was that the Magistrate had the authority to call the parties for a second stage inquiry to determine who actually possessed the disputed land. The preliminary order was valid for the purposes of s. 99(1) of the CPC to confer jurisdiction on the Magistrate to conduct the inquiry. (paras 18-19, 20 & 21)

(4) In determining who among the parties had actual possession of the disputed land under s. 99(4) of the CPC, the section goes on to state that if there is forcible dispossession within two months of the date of the preliminary order, such dispossession may be construed as such person having actual possession of the disputed land. The respondent had forcibly prevented the appellants from entering the land and the forcible dispossession occurred within two months of the preliminary order being obtained from the Magistrates' Court. There was enough evidence to deem that the appellants were in actual possession of the land. The Magistrate was aware of the provision in s. 100 of the CPC that allowed her to attach the land until the matter was resolved in civil court if she was unsure of who was in actual possession or was unable to ascertain this fact. Ironically, she did not condescend to do so. The Magistrate clearly erred in determining who among the parties had a better right to the land. Neither the Magistrate nor the respondent denied that the appellants had been in possession of the land for more than two decades. At the very least, the Magistrate should have issued an order attaching the said disputed land and left the issue to the civil court to decide. (paras 33-36)

Case(s) referred to:

Anoop Keshari Alias Anoop Chowdhary v. State Of Uttar Pradesh & Ors (Case No: Application U/S 482 No. 2331 of 2020) (2020) 06 ILR A84 ***(refd)***

Chan Hoh v. Than Kum & Anor [1967] 1 LNS 16 HC ***(refd)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

RH Bhutani v. Miss Mani J Desai & Ors AIR 1968 SC 1444 ***(refd)***

Saad Nayan & Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor [1995] 4 CLJ 531 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 35

Criminal Procedure Code, ss. 99(1), (3), (4), (6), 100, 145, 323

Criminal Procedure Code [India], ss. 99, 145

Other source(s) referred to:

Ratanlal & Dhirajlal, *The Code of Criminal Procedure,* LexisNexis, 21st edn, p 459, paras 44-45

For the appellant - Jespreet Kaur & Bawani Kaniapan; M/s Bawani Nur
For the respondent - Manjit Singh; M/s Manjit Singh Mann & Co

Reported by Lina E

JUDGMENT

Moses Susayan JC:

[1] This is an appeal from a decision rendered by the Magistrates' Court of Kampar following an inquiry pursuant to s. 99 of the Criminal Procedure Code ("CPC"), based on a complaint filed by the appellants on 19 June 2022. The complaint under the aforementioned provision against the respondent is regarding a dispute involving immovable property that was likely to cause a breach of public peace. The complaint filed is for a temporary order declaring the party who will be entitled to retain possession of the immovable property until determination by a civil court of competent jurisdiction, and by that, forbidding all disturbance on or to the said property.

[2] The appellants claim that they were in actual possession of the government land known as Lot 404517 and Lot 35138 in Mukim Kampar, Kampar District, Perak (hereinafter referred to as "the said disputed land"). The appellants and their ancestors are said to have been cultivating the said disputed land, which was once an abandoned ex-mining land, into agriculture land and an animal farm for local supply. The appellants have been living peacefully on the said disputed land since 2016. Some of the appellants have applied to the authorities to have the said disputed land alienated to them. Sometime in mid-2016, the respondents and/or their representatives began harassing the appellants, claiming that the respondent owned the said disputed land. Due to the conflict on the said disputed land, there were numerous police reports lodged between the appellants and the respondent.

Finally, the respondent's representatives forcibly took possession of the said disputed land a month prior to the complaint being made to the Magistrates' Court. The respondent's actions prevented the appellants from entering the said disputed land, had disrupted livestock and farming operations, had confiscated crops, and had deprived the appellants of income. The appellants are concerned that the conflict with the respondent will escalate into a public confrontation and a breach of the peace over the said disputed land.

[3] The respondent claims to be in possession of the said disputed land by presenting evidence of owning a mining permit for land demarcated as Land A and another as Land B for which they have a temporary occupation licence from the state authorities and further that they have business operating on the said disputed land.

[4] The appellants seek a temporary order under s. 99 of the CPC to prevent a breach of peace from the parties' dispute over the said disputed land. Section 99 of the CPC provides as follows:

> s. 99. Procedure where dispute concerning land, *etc.*, is likely to cause breach of peace
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> (1) Whenever a First Class Magistrate is satisfied, from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in the dispute to attend his Court in person or by advocate within a time to be fixed by the Magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.
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> (2) For the purposes of this section and of section 101, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property.
>
> (3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate directs, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.
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> (4) The Magistrate shall then, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary, and if possible decide whether any and which of the parties is then in actual possession of the said subject:
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> Provided that:
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> (a) if it appears to the Magistrate that any party has, within two months next before the date of the order, been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at that date;

A (b) if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend from showing that no such dispute as aforesaid exists or has existed, and
B in that case the Magistrate shall cancel the order and all further proceedings on it shall be stayed.

(6) If the Magistrate decides that one of the parties is then in actual possession of the said subject he shall issue an order declaring that party to be entitled to retain possession of it until evicted from it in due course of law, and forbidding all disturbance of such possession until such
C eviction.

(7) Proceedings under this section shall not abate by reason only of the death of any of the parties thereto.

[5] Section 99(1) of the CPC mandates a two-stage process. First, the
D Magistrate must be convinced that the complaint is about immovable property and will cause a breach of the peace. After the first step, the learned Magistrate will issue a preliminary order under s. 99(1) of the CPC. The second stage, consists of calling the parties for an inquiry under sub-s. (4) of s. 99 to determine, without reference to the merits of the claims of any of
E the parties to a right to possess the said disputed land, but to peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as the Magistrate thinks necessary, and if possible, decide whether any of the parties are in actual possession. Followed by this determination the Magistrate will issue a final order under sub-s. (6), declaring the party
F entitled to retain possession of it until evicted by law and forbidding all disturbance of such possession until such eviction. These provisions do not grant the Magistrate the authority to decide the competing rights and interests of the parties concerning the said disputed land. The Magistrate's duty is limited to declaring and maintaining possession by a party found to be in
G actual possession upon inquiry. The effect of final order is temporary in nature, in that to maintain *status quo* pending their rights being determined by the civil court of competent jurisdiction. Having said that, the question of actual possession under s. 99 of the CPC, is to be decided by the Magistrate without regard to the merits of the claim to the right to possess.
H Typically, only a civil court has jurisdiction over such disputes.

[6] In determining who among the parties here has actual possession of the said disputed land, the Magistrate can take cognisance of any party who has been forcibly and wrongfully dispossessed within two months next before the date of the order, and the Magistrate may treat that party as if he had been
I in possession at that date: Section 99(4) of the CPC.

[7] Section 99(3) describes how stage one orders are served on the respondents. However, this is not an issue in this case which necessitates discussion.

[8] In *Saad Nayan & Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor* [1995] 4 CLJ 531, the court set out the jurisdiction conferred on the Magistrate in respect of s. 99 of CPC:

> The jurisdiction conferred upon a Magistrate under ss: 99, 100 and 101 of the CPC to deal with disputes concerning immovable property is an exceptional one and the provisions of the sections should, therefore, be strictly followed when any action is taken thereunder. The Magistrate must exercise the powers strictly, within the four-corners of the relevant provisions. Therefore, when the procedures laid down have been overlooked, any action taken by the Magistrate must be held to be without jurisdiction. The Magistrate should avoid slipshod or perfunctory procedure in dealing with cases under s. 99 CPC. He should not deal with any police report, any information or any complaint merely for the sake of getting through a duty in a superficial and mechanical manner …
>
> Section 99 (together with s. 100 CPC) is to be used for deciding disputes as to possession and not title regarding immovable property between private parties. When the dispute is between the Government and a private party, s. 99 CPC is inapplicable. When the private party wants to maintain his possession against the Government, he should move the High Court for a declaration under O. 15 r. 16, of the Rules of the High Court, 1980. A declaratory relief is about the only remedy available to him because under s. 29(1)(b) of the Government Proceedings Act, 1956, the Court shall not make any order for the recovery of the land against the Government in any proceedings but may only make a declaration of a private party's rights to title or possession as against the Government (see also *Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors.* [1986] 1 MLJ 362).
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> The mere fact that a dispute exists between the parties, which is obviously of a civil nature, would not warrant the Magistrate to assume jurisdiction and initiate proceedings under s. 99 CPC.
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> Section 99 and s. 100 of the CPC provide a speedy remedy in order to prevent a breach of the peace by bringing the parties concerned before the Magistrate and ascertaining (if possible) who of them was in actual possession, and, thereafter, maintain *status quo* until their rights are determined by a competent civil Court.
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> …
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> The whole purported proceedings under s. 99 CPC by the learned Magistrate, Jitra, is unlawful and void *ab initio*, consequent upon the issue and signing of the two Notis dated 16 January 1994 and 30 January 1994, at the instance of the solicitors for the complainants. Magistrates should not sign and seal documents prepared by any party (where no standard forms are provided) without first considering the law and the serious

implications and consequences. It is most desirable that the preliminary order under s. 99(1) be drafted personally by the Magistrate concerned, in the event he exercises his discretion to initiate proceedings, in any fit and proper case.

Flowing from the above events, the order made by the Magistrate on 15 February 1994, purporting to set aside the (non-existent preliminary) order issued on 24 January 1994 and 2 February 1994, is null and void. The question of the Magistrate making a final order under s. 99(6) CPC does not arise.

In the exercise of my powers of revision, I quash the purported s. 99 proceedings initiated by the learned Magistrate, Jitra, on 24 January 1994 and 2 February 1994, by reason that it is totally irregular, null and void for mandatory requirements of non-compliance with the s. 99(1) and (3) of the CPC.

[9] The scope of s. 99 is similar to that of the Indian Criminal Procedure Code s. 145, where the Supreme Court of India summarised the broad object of this provision in *RH Bhutani v. Miss Mani J Desai & Ors.* AIR 1968 SC 1444; [1969] 1 SCR 80:

The object of s. 145, no doubt, is to prevent breach of peace and, for that end, to provide a speedy remedy by bringing the parties before the court and ascertaining who of them was in actual possession and to maintain the status quo until their rights are determined by a competent civil court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute, regarding an immoveable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under sub-s. (1) and thereafter to make an enquiry under sub-s. (4) and pass a final order under sub-s. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under s. 145 is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties. Under the second proviso, the party who is found to have been forcibly and wrongfully dispossessed within two months next preceding the date of the preliminary order may for the purpose of the enquiry be deemed to have been in possession on the date of that order. The opposite party may of course prove that dispossession took place more than two months next preceding the date of that order and in that case the Magistrate would have to cancel his preliminary order. On the other hand, if he is satisfied that dispossession was both forcible and wrongful and took place within the prescribed period, the party dispossessed would be deemed to be in actual possession on the date of the preliminary order and the Magistrate would then proceed to make his final order directing the dispossessor to restore possession and prohibit him from interfering with that possession until the applicant is evicted in due course of law. This is broadly the scheme of s. 145.

[10] Having set out the facts, the underlying principles, and the object of the provision under s. 99 of the CPC, I shall now state what transpired in the Magistrates' Court in respect of the complaint filed by the appellants.

Stage One: Preliminary Order

[11] On 24 June 2022, the Magistrate was satisfied the appellants' complaint involves a dispute over a land that is likely to cause breach of peace and issued the preliminary order pursuant to s. 99(1) in favour of the appellants, in which the learned Magistrate failed to state the grounds for issuing the preliminary order and thereafter called the parties for inquiry. However, upon inquiry, that is, after considering the statements by the parties, hearing the parties' counsels, and receiving the evidence produced by the parties as provided for under s. 99(4), the Magistrate decided on 17 August 2022, that the respondent had actual possession of the said disputed land and thereby dismissed the appellants' complaint. The appellants, not satisfied with the decision of the Magistrate, filed an appeal, which is before this court.

[12] At the start of the appeal, the respondent raised three preliminary objections:

(i) that this matter cannot be proceeded as an appeal as there is no statutory provision for an appeal;

(ii) that the Magistrate failed to comply with s. 99(1) of the CPC in that she failed to provide grounds on which the learned Magistrate was satisfied that a dispute was likely to cause a breach of peace over the said disputed land; and

(iii) failure to name the State Government as a party.

[13] By reasons of preliminary objection in (a) and (b) above, the respondent submits that the proceeding is void *ab initio*. The third challenge on failure to make the Government as a party, this court is not inclined to deal with it as the dispute here is only between private parties as to who is in actual possession of the said disputed land. There is no involvement of any Government authorities on the issue of actual possession, though legal rights over the said disputed land is arguably determined by issuance of a temporary occupation licence by the state authority.

[14] The first objection was raised based on the case of *Saad Nayan & Ors. v. Syarikat Samak Aquaculture Sdn Bhd & Anor* (*supra*) where the court said:

> At the very outset I had intimated to Counsel for both the appellants and the respondents that this matter before me cannot be proceeded as an appeal as there is no statutory provision for an appeal in respect of any order or decision by the learned Magistrate in the exercise of his powers under s. 99 CPC. Mr. G.S. Nijar, Counsel for the appellants, has very correctly conceded that this matter should not be dealt with as an appeal.

A He urged the Court to exercise its powers of revision under s. 323 CPC and s. 35 of the Courts of Judicature Act, 1964 .

Under s. 307 CPC, the relevant part of which reads:

... any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to B which he is a party may prefer an appeal to the High ...

What is a criminal case (cause) or matter? In *Amand v. Home Secretary and Minister of Defence* [1943] AC 147 at 162 Lord Wright said:

The principle which I deduce from the authorities cited and the other relevant authorities which I have considered, is that if the cause or matter C is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as, imprisonment or fine, it is a 'criminal cause or matter'.

Clearly, the appellants herein do not have a right of appeal. Therefore, this appeal is dismissed, at liminis. Nevertheless, having gone through the D record of appeal, I am very much concerned and anxious over the regularity or otherwise of the proceedings before the learned Magistrate, at Jitra. I shall take this opportunity to exercise my general powers of revision.

[15] The first objection, in light of *Saad Nayan & Ors v. Syarikat Samak* E *Aquaculture Sdn Bhd & Anor* (*supra*) is a valid objection and this court agrees that the proceeding herein cannot be by way of an appeal. The counsel for the appellants, in abundance of caution, urged this court to also exercise its powers of revision under s. 323 of the Code of Criminal Procedure and s. 35 of the Courts of Judicature Act 1964, as was in the case of *Saad Nayan* F *& Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor* (*supra*), which this court is inclined to exercise in light of the serious errors committed by the Magistrate in the exercise of her powers under s. 99 of the CPC, which I will discuss in these grounds of judgment.

[16] Moving on to the second preliminary objection, namely the G Magistrates' failure to state her grounds on the preliminary order issued on 24 June 2022. I reproduce here the preliminary order dated 24 June 2022:

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AL-89-28-06/2022

24/06/2022

DALAM MAHKAMAH MAJISTRET DI KAMPAR
DALAM NEGERI PERAK DARUL RIDZUAN
ADUAN AWAM NO. AL-89-28-06/2022

PERINTAH
(dibawahSeksyen 99(1) KanunTatacaraJenayah)

Kepada:

1. CHUNG CHEE CHOY
(NO.K/P:831114-08-5493)
No.23 Kampung Baru,Tronoh Mines,
31910 Kampar,
Perak Darul Ridzuan

2. RIDZUAN BIN MOHD SARIF
(NO.K/P:860521-08-6553)

3. CHEAH KIM WAH
(NO.K/P:830121-08-6267)

4. LEE MING SING
(NO.K/P:780729-08-5385)

5. MAH AI SHI
(NO.K/P:870402-08-5160)

PENGADU-PENGADU

DAN

CHEE MUN MINING
(NO. PENDAFTARAN PERNIAGAAN: IP0057074-K)
Lot 12646,126747 & 137739 Mukim Kampar,
Daerah Kinta,
31900 Kampar,
Perak Darul Ridzuan

RESPONDEN

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ADALAH DIMAKLUMKAN BAHAWA Mahkamah ini telah menerima aduan daripada CHUNG CHEE CHOY (No. K/P: 831114-08-5493) dan 4 yang lain pada 20 Jun 2022 terhadap CHEE MUN MINING (No. Pendaftaran Perniagaan: IP0057074-K) bersabit dengan harta tak alih iaitu sebidang tanah dikawasan LOT 404517 & LOT 35138, MUKIM KAMPAR, DAERAH KAMPAR,NEGERI PERAK.

SETELAH MENDENGAR DAN MENELITI ADUAN TERSEBUT, Mahkamah ini berpuas hati bahawa telah wujud suatu pertikaian mengenai harta tak alih tersebut iaitu sebidang tanah di kawasan LOT 404517 & LOT 35138, MUKIM KAMPAR, DAERAH KAMPAR,NEGERI PERAK, dan pertikaian mengenai harta tak alih tersebut berkemungkinan akan mengakibatkan berlakunya pecah keamanan.

MAKA ADALAH DENGAN INI DIPERINTAHKAN BAHAWA pihak – pihak yang dinamakan seperti di atas hendaklah hadir secara sendiri atau melalui peguamcara yang dilantik ke Mahkamah Majistret Kampar pada 13 Julai 2022 jam 9.00 pagi dan memasukkan Pernyataan Bertulis masing – masing bersabit dengan tuntutan terhadap milikan sebenar (*actual possession*) harta tak alih tersebut.

Bertarikh pada 24 haribulan Jun 2022.

PERAK

T KAVITA A/P THANGGA RAJOO
Majistret
Mahkamah Majistret
Kampar

[17] After careful scrutiny of the above order, and the notice (preliminary order) issued by the Magistrate in *Saad Nayan & Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor* (*supra*) and after considering the following passage from *"The Code of Criminal Procedure" Ratanlal & Dhirajlal*; 21st edn; LexisNexis at p. 459, paras. 44 & 45, which states:

> **44. Recording reasons.** – Where a Magistrate is satisfied that in view of imminent breach of peace an order of attachment of the property should be passed without hearing the other side, he can pass such order after recording the circumstances justifying such an extreme action and it should be apparent on the face of the order that the Magistrate was satisfied about the existence of plausible causes for exercising extraordinary powers vested in him for attaching the property during the proceedings. The preliminary order must state clearly the reasons and grounds on which satisfaction is based and the Magistrate should apply his mind in passing the order. Where no reasons are mentioned in the order passed under section 145(1), the order is liable to be set aside.
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> Failure to record reasons for passing a preliminary order under this section would not always be considered fatal. It is enough if his order makes it apparent that he has applied his mind to the material on record.
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> **45. Cryptic order** – Magistrate's order which is too brief and cryptic but showing application of mind is not a questionable one. (emphasis added)
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> As such, on the face of it, the cryptic preliminary order issued by the Learned Magistrate cannot be dismissed as not stating any grounds in it.

[18] Though, the preliminary order dated 24 June 2022, is not a speaking order as it ought to be, I am nevertheless satisfied that the Magistrate at the juncture of making the said preliminary order had heard and carefully considered the complaint and as such, has applied her mind to the material before her. The part of the order in which I am made to be convinced is this which states "**Setelah Mendengar Dan Meneliti Aduan Tersebut**, Mahkamah ini berpuas hati bahawa telah wujud suatu pertikaian mengenai harta tak alih tersebut iaitu sebidang tanah di kawasan Lot 404517 & Lot 35138, Mukim Kampar, Daerah Kampar Negeri Perak dan pertikaian mengenai harta tak alih tersebut berkemungkinan akan mengakibatkan berlakunya pecah keamanan".

[19] The learned Magistrate issued the preliminary order because she was satisfied that there was a dispute relating to immoveable property and that the dispute was likely to cause a breach of peace.

[20] I would also add that since the preliminary order only grants the Magistrate jurisdiction to move on to the second stage, it is therefore crucial to consider whether the Magistrate applied her judicial mind before determining the preliminary issue. The preliminary order does not give the complainant a remedy in any way. The only thing it establishes is that the Magistrate has the authority to call the parties for a second stage inquiry to determine who actually possesses the disputed land. The order from the

second stage, which the final order provides remedy by prohibiting one party from interfering with the other party's use of the said land in dispute until the civil court determines the parties' rights.

[21] Based on what was discussed above, this court holds that the preliminary order dated 24 June 2022, is valid for the purposes of s. 99(1) of the CPC to confer jurisdiction on the Magistrate to conduct the inquiry. The preliminary order only establishes that the Magistrate has the jurisdiction to move on to the next step of the proceeding under s. 99, which is to call the parties for inquiry to prove who among them has actual possession of the said disputed land. The preliminary order does not restrict any party from interfering with the use or having actual possession of the said disputed land. The order does not demand any compliance from the parties to the dispute, it is not to remedy any breach sought by the complainants.

[22] Learned counsel for the respondent relied on *Saad Nayan & Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor* (*supra*), to persuade this court to hold the proceeding before the Magistrate null and void because she failed to state her grounds for issuing the notice (preliminary order). This is what the court said in holding the proceeding null and void:

> … (at page 538) … All I can say is that it was highly improper, irregular, prejudicial and unlawful for the solicitors to have placed before the Magistrate the said Notis even before the Magistrate had applied his mind judicially to act one way or the other on the information available to him regarding the (alleged) dispute concerning the said lands, which was likely to cause a breach of the peace. The Notis ensnared the Magistrate into acting in the most perfunctory manner imaginable – he has acted rather mechanically (for all intents and purposes) without first appreciating what he was required to do in initiating proceedings under s. 99(1) CPC
>
> … The Maklumat dan Aduan sans the Notis was all that was necessary to move the Magistrate to consider his cause of action. The Magistrate has seriously erred in law when he failed to issue the mandatory order in writing setting out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists, concerning the lands in question.
>
> … (at page 539) .. The whole purported proceedings under s. 99 CPC by the learned Magistrate, Jitra, is unlawful and void *ab initio*, consequent upon the issue and signing of the two Notis dated 16 January 1994 and 30 January 1994, at the instance of the solicitors for the complainants. Magistrates should not sign and seal documents prepared by any party (where no standard forms are provided) without first considering the law and the serious implications and consequences. It is most desirable that the preliminary order under s. 99(1) be drafted personally by the Magistrate concerned, in the event he exercises his discretion to initiate proceedings, in any fit and proper case.
>
> Flowing from the above events, the order made by the Magistrate on 15 February 1994, purporting to set aside the (non-existent preliminary) order issued on 24 January 1994 and 2 February 1994, is null and void.

[23] However, on my part, for the reasons already stated earlier, I am not persuaded by *Saad Nayan & Ors v. Syarikat Samak Aquaculture Sdn Bhd & Anor* (*supra*). Further, I am constrained to state that the learned judge in *Saad Nayan*'s case took exception to the Magistrate signing on the order drafted by the solicitors for the complainant, which is done in a natural course of events as in all cases where draft orders are prepared by the solicitors for approval by the court. The learned judge formed the view that due to the solicitors drafting the notice (preliminary order), the Magistrate did not apply his judicial mind in the determination of the issue.

[24] To further elaborate on the concept of applying judicial mind, I refer to another Indian case, decided in the High Court of Judicature at Allahabad, *Anoop Keshari Alias Anoop Chowdhary v. State of Uttar Pradesh & Ors Case No: Application U/S 482 No. 2331 of 2020*; (2020) 06 ILR A84. The similar issue of grounds not provided in the preliminary order was considered by the court. The fact of the case deals with s. 145 of the Criminal Procedure Code which is equivalent to our s. 145 of the CPC. In actual fact, the dispute was regarding the office of management of the society, registered under the Societies Registration Act, which cannot be held as a dispute regarding ownership and possession of immovable property. Further, the facts as they unfold show the connivance of local police as well as the Executive Magistrate. Given the background facts of the case, the failure to provide grounds speaks volumes about the conclusion reached by the Magistrate. Where the learned judge concluded that the Magistrate did not apply his judicial mind. This is what the court said:

> 7. … In the impugned order, the Magistrate, for initiating proceeding u/s 145 Cr.P.C., has written about dispute regarding ownership and possession of the property, which is apparently against facts on record. This reveals that the Magistrate, while passing the impugned order, has not applied its judicial mind. This order is with no reason. Whereas initial order is to be passed with reason, as has been mentioned in section 145 Cr.P.C. *The condition precedent for passing order by the Magistrate is that the Magistrate has to give proper reasons for his satisfaction for invoking jurisdiction u/s 145 Cr.P.C. But in the impugned order there is no reason at all. On this score only the impugned order u/s 145(1) Cr.P.C. is not to be sustained.*
>
> 8. Regarding second impugned order u/s 146(1) Cr.P.C., the parties appeared before the Magistrate, they filed their reply and documents in support of their contentions. What were the documents, how it was appreciated, what questions were involved, what were facts of documents, what were contentions of parties have not been mentioned in the impugned order. *It itself shows that the Executive Magistrate, while passing impugned orders u/s 145(1) Cr.P.C. as well as u/s 146(1) Cr.P.C., has not followed the mandate of Legislature given under sections 145 and 146 Cr.P.C. Order of this character can never be said to be an order after application of judicial mind.* There is principle of legislative expectancy that when a dispute is there, both sides are filing their reply and documents in support of their claim then

> the man, who is making decision, has to mention both sides' contentions and the documents filed by them in support of their respective claim, then the reasons for taking the decision and then only the order can be held to be on application of judicial mind. Hence both the impugned orders are not to be sustained, as such they are under abuse of process of law.
>
> (emphasis added)

[25] It is not the mere fact that the Magistrate did not state the grounds in the preliminary order that would render the proceeding null and void but whether the Magistrate had considered them by applying her judicial mind.

[26] With the discussion thus far above, I come to the conclusion that the first stage of s. 99(1) of the CPC is completed and the Magistrate is duly vested with the jurisdiction to proceed into the second stage of s. 99(4) of the CPC, which is calling the appellants as the complainants and the respondent for inquiry and considering all the evidence to determine who has actual possession of the said disputed land.

Stage Two: Inquiry Into Actual Possession

[27] Section 99(4) of the CPC provides for the Magistrate to consider without reference to the merits of the parties' right to possess the said disputed land by hearing parties and receiving other evidence to determine who has actual possession.

[28] The appellants contend the said disputed land is an empty and abandoned ex-mine land that has been cultivated by the appellants with palm oil, durian and freshwater fish farming. The appellants have continuously spent the past two decades living and working the said disputed land in question for agricultural and animal husbandry purposes. The appellants have constructed a fence structure, access roads to the area of the appellants' fish farming ponds, built store structures for storing goods, and planted coconut trees, both those that have matured to fruit and those that are in the early stage of maturity, as evidenced by photographs submitted by the appellants in their testimony before the Magistrates' Court. The appellants have actively cultivated the said disputed land without interference from any party until around 2016.

[29] The respondent, on the other hand, cites rights to the said disputed land, such as "pajakan," "lesen pendudukan sementara," sale and purchase agreement, and "perakuan melombong," as evidence that they actually possess the said disputed land, as the Magistrate has considered them in the grounds of judgment. This is what the learned Magistrate stated in her grounds:

> 15. Pihak Responden pula menyatakan bahawa pihak Responden telah lama dan masih sedang menduduki (occupying) Lot 404517 melalui Pajakan Melombong ML 051 dan Lot 35138 melalui Lesen Pendudukan Sementara No. Lesen A13/2022/44/1 Bagi tanah di Lot 404517. pada permulannya Kamaruddin Bin Abbas dan Rakan-Rakan telah diberi kuasa

untuk memasuki, menduduki dan melombong sejak 1985. Kemudiannya berdasarkan kepada satu Perjanjian Jual beli dan Surat Kuasa Wakil dengan Chong Chung Mun, Perakuan Melombong No. 6894 tersebut diambil alih sepenuhnya oleh Chee Mun Mining. Perakuan Melombong telah diperbaharui beberapa kali sehingga ke tarikh 18.7.2024. Pihak Responden juga berkata mereka mempunyai surat-surat dari Jabatan Mineral dan Geosains Malaysia dimana Pengarah Gallan Perak telah meluluskan skim pengendalian melombong di atas tanah tersebut seperti berikut:

a) Melalui surat bertarikh 7.10.2016 bagi tempoh 7.10.2016 hingga 6.10.2017;

b) Melalui surat bertarikh 17.9.2020 bagi tempoh 1.10.2020 hingga 30.09.2021; dan

c) Melalui surat bertarikh 3.6.2022 bagi tempoh 27.4.2022 hingga 18.07.2024

16. Manakala bagi Lot 35138. Responden telah memperolehi Lesen Pendudukan Sementara pada 31.03.2022 daripada Pentadbir Tanah Kampar bagi tujuan melonggok hampas lombong,membina bangunan untuk operasi perlombongan, membina rumah kongsi dan membina tapak palong untuk tempoh berakhir pada 31.12.2022. Responden turut mengemukakan Lesen Pendudukan Sementara yang diperolehi sebelum tahun 2022 untuk tujuan yang sama di Lampiran 5. Maka, secara ringkasnya pihak Responden berhujah bahawa mereka telah berada di Harta Tak Alih tersebut sejak tahun 1980-an untuk tujuan melombong dimana lanya juga termasuk dalam ambit kegunaan "tanah" di bawah seksyen 99 (2) KTJ.

17. Daripada rentetan fakta kes di atas, adalah jelas bahawa pihak Responden telah berada di tanah tersebut dengan kebenaran atau pengesahan daripada Pentadir Tanah Kampar atau Pihak Berkuasa Negeri sebelum pihak Pemohon pula menerokainya. Manakala pihak Pemohon pula telah mula menerokai tanah tersebut 2 dekat yang lalu lebih kurang tahun 2000 dan mengusahakan tanah tersebut.

18. Merujuk kepada keterangan yang dieksibitkan oleh pihak Pemohon dalam: Lampiran 7, Pihak Pemohon hanya sekali sahaja memohon untuk mendapatkan milikan tanah di Wilayah Tronoh Mines Mukim Kampar, Daerah Kampar, namun demikian permohonannya ditolak. Maka, Mahkamah berdapati aduan oleh Pengadu adalah tidak berasas bahawa mereka telah berada di kawasan tersebut sebelum Responden datang dan melaksanakan tindakan-tindakan yang telah dijelaskan seperti di dalam pengaduan yang boleh menimbulkan kacau ganggu kepada keamanan yang ada sebelum ini. Walaupun pihak Pemohon mengadu bahawa pertikaian menjadi parah apabila pintu pagar dan meletakkan pengawal keselamatan bagi menghalang pihak Pengadu masuk ke dalam Harta tak Alih tersebut, isu siapakah yang mempunyai "actual possesion tidak dapat diputuskan at this Juncture".

22. … Jika dibandingkan dengan pihak Pemohon, pihak Responden telah lama dan masih menduduki tanah tersebut sebelum pihak Pemohon atau generasi pihak Pemohon menerokal dan mengusahakan tanah tersebut. Tambahan pula, pihak Responden berada di tanah tersebut dengan lesen atau Perakuan yang sah.

[30] The reference to Sohoni's *The Code of Criminal Procedure*, 1973, 19th edn is sufficient to establish the legal proposition regarding what the Magistrate should be concerned with when determining actual possession for the purposes of s. 99 of the CPC. Page 1263, para. 130 contains the following:

130. Possession to be actual physical possession. This section is concerned solely with the fact of actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. Therefore, in proceedings under this section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant. It is actual possession which is not under his right to possess nor it is which amounts to lawful or legal possession. In short, it is physical and continuous possession. It is clear from sub-section (4) that the magistrate is prevented from going into the merits of title or claim. So any person or third party who may intervene in the dispute showing his right to possess or title to possess on the basis of some transaction, cannot be competent to invite the Magistrate to decide his claim. Where the Magistrate discharged some of the parties on the ground that they were merely tenants of the other persons who were parties, the order was held to be illegal when the persons who were so discharged claimed to be in possession of the properties.

[31] In light of what the learned Magistrate should be concerned about and what she has considered in terms of the facts pertaining to the respondent's "rights," she has either intentionally or unintentionally considered merit issues contrary to s. 99 of the CPC.

[32] In addition, by focusing on legal matters that fall under the purview of a civil court, such as those pertaining to the application of local laws, land ownership, and the doctrine of adverse possession, the Magistrate has exceeded her jurisdiction and the scope of s. 99 of the CPC.

[33] In determining who among the parties has actual possession of the disputed land under s. 99(4) of the CPC, the section goes on to state that if there is forcible dispossession within two months of the date of the preliminary order, such dispossession may be construed as such person having actual possession of the disputed land. This proposition is well laid out in the case of *Chan Hoh v. Than Kum & Anor* [1967] 1 LNS 16; [1968] 2 MLJ 56, where His Lordship Raja Azlan Shah, after careful consideration of the facts states this:

The two respondents and the appellants were partners in a sundry goods business at the said premises from February 26, 1946 until February 26, 1966 when it closed down. The respondents carried on with the business after the partnership was officially dissolved on August 4, 1967. The appellants, as chief tenant, allowed the respondents to remain in the said premises under clause 17 of the partnership agreement at a monthly rental of $243 until October 1967, but refused to accept any more rent which was tendered thereafter. After the respondents had left for home on the evening of December 1967 the appellants took possession of the said premises by instructing his two sons to lock up the place from within and without and to sleep therein. On December 9, 1967 the respondents found that they could not enter the said premises which they said contained $1,500 worth of their own goods. In spite of repeated requests the appellants' sons refused to discuss the matter with them. They seemed helpless and did not offer any resistance. They then lodged two reports with the police and subsequently filed a complaint at the Kuala Lumpur magistrate's court. On December 19, 1967 the learned magistrate issued a preliminary order, having satisfied himself that a dispute likely to cause a breach of the peace existed between the two parties in respect of the said premises. At the enquiry held on December 21, 1967 the appellants stated that he had acted as he did because the partnership had been dissolved on August 4, 1967, the respondents had no right to the said premises, and they had refused to quit despite having been served with several notices through his solicitors.

In those circumstances the learned magistrate was satisfied that the respondents, within the two months next before the date of the preliminary order, were forcibly and wrongfully dispossessed from the said premises by the appellant. Without going into the merits of either party's claim to the said premises he concluded that:

> The acts of closing inside and outside the said premises and asking the two sons of the appellant to sleep therein are more than sufficient to constitute wrongful and forcible dispossession.

By virtue of the provisions of section 99(iv)(a) of the Criminal Procedure Code he therefore treated the respondents as being in actual possession at the date of the preliminary order and declared that they were entitled to retain possession of the said premises and the parties were to keep the peace until the matter was disposed of by a civil court of competent jurisdiction.

[34] Similarly, as evidenced by the following facts, the respondent has forcibly prevented the appellants from entering the said disputed land (forcible dispossession):

(i) the respondent trespassed on the appellants' farm;

(ii) on 11 June 2022, the respondent had damaged the lock on the appellants' gate and refused the appellants access to the farm (oil palm estate);

(iii) the respondent had confiscated the appellants' crops and livestock;

(iv) on 10 June 2022, the respondent blocked the appellants from entering their farm (fish pond); and

(v) on 31 May 2022, the respondent locked the said disputed land's entrance gate, preventing the appellants from getting out of the said disputed land.

(in respect of all the complaints, the appellants have lodged police reports).

[35] The above forcible dispossession occurred within two months of the preliminary order obtained from the Magistrate's Court on 24 June 2022. There is enough evidence to deem that the appellants were in actual possession of the disputed land.

[36] The learned Magistrate was aware of the provision in s. 100 of the CPC that allows her to attach the said disputed land until the matter is resolved in civil court if she is unsure of who is in actual possession or unable to ascertain this fact. Ironically, she did not condescend to do so. The learned Magistrate clearly erred in determining who among the parties has a better right to the said disputed land. Neither the Magistrate nor the respondent deny that the appellants have been in possession of the said disputed land for more than two decades. At the very least, the Magistrate should have issued an order attaching the said disputed land and left the issue to the civil court to decide. If she had done so, I would not be inclined to disturb her decision because the scale of injustice was not disproportionately stacked against one party over the other.

[37] Since much of the exercise of this court is on revisionary power, it will be useful to set out some principles on the exercise of revisionary powers by the High Court, which are summarised from *Mallal's Criminal Procedure*, 8th edn, LexisNexis [1714-1715] that is worth mentioning here:

(i) a court sitting in revision only deals with evidence or disturbs the lower court's finding of fact in rare cases, to prevent a miscarriage of justice;

(ii) in revision, the court will only address legal or procedural errors;

(iii) in an application for revision, the High Court must decide whether substantial justice has been done and whether it should intervene in the interests of justice;

(iv) the High Court judge in his revisionary capacity may look beyond the issues raised by the parties to determine whether substantial justice was done;

(v) the High Court should not revise when substantial justice has been done;

(vi) revision gives the applicant only the right to bring the case to the notice of the court;

(vii) the revision court must decide whether to intervene in cases of real and substantial injustice;

(viii) a revision application is not a second appeal on question of law;

(ix) the High Court should only use its revisionary jurisdiction if a serious injustice has occurred; and

(x) the court must use its revisionary powers slowly, especially if no appeal was filed.

[38] The objective of revisionary powers under the CPC was explained by the Supreme Court in *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 as follows:

> We could observe that the power of revision to be exercised in accordance with the law for the time being in force relating to Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is – To confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment, which has resulted on the one hand injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

[39] Procedurally, this matter should not have come before this court *via* an appeal, but as I earlier stated, I have proceeded to hear the matter with the revisionary power vested in the High Court. Furthermore, having discovered a serious error on the part of the Magistrate in the application of s. 99 of the CPC and having considered the various cases discussed above, this court was duty bound to intervene in the learned Magistrates' decision in the interest of justice by exercising its revisionary powers.

Conclusion

[40] For the reasons stated above and in light of the learned Magistrates' grave procedural error in the application of s. 99(4) of the CPC, in that she entered an arena in which she has no jurisdiction to decide on the rights of the parties *vis-a-vis* legal ownership or otherwise of the disputed land, which is the province of the civil court of competent jurisdiction, it warrants this court to interfere in the decision of Magistrate's court by exercise of its revisionary powers. As a result, I order that the final order of the learned Magistrate dated 17 August 2022 be set aside.